

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

TOM ORT TRUCKING, INC.,

Respondent.

**Docket No. FMCSA-2007-0006¹
(Midwestern Service Center)**

ORDER ON MOTION FOR CLARIFICATION

On April 8, 2010, I issued an order assigning this matter to hearing. The Notice of Claim had charged Respondent with 43 counts of having violated 49 CFR 395.8(e), false reports of records of duty status. Respondent denied 30 of the charges, requesting a formal hearing on those charges. As to the remaining 13 charges, I found that Respondent had admitted the violations, but had avoided default by seeking binding arbitration. I further stated:

An administrative law judge is hereby appointed, to be designated by the Chief Administrative Law Judge of the Department of Transportation, to preside over this matter in accordance with 49 CFR 386.54, and render a decision on all issues, including the civil penalty (including the civil penalty on the 13 admitted violations), if any, to be imposed. The proceeding shall be governed by subparts D and E of 49 CFR Part 386 of the Rules of Practice and all orders issued by the administrative law judge.²

On April 15, 2010, Claimant, the Field Administrator for the Midwestern Service Center, Federal Motor Carrier Safety Administration (FMCSA), requested clarification of my order, asking whether I intended to enter a default judgment for him on the 13 admitted counts. I did not intend to enter a default judgment on the 13 admitted counts,

¹ The previous case number of this matter was WI-2007-0169-US0563.

² Order Appointing Administrative Law Judge, April 8, 2010, at 7-8.

having found in the order that Respondent had avoided default by seeking binding arbitration. Although I asked the administrative law judge to render a decision on all issues, whether or not Respondent violated the regulations with regard to the 13 charges was not at issue because Respondent, by not denying those allegations, had admitted them.³ Therefore, the only issue to be considered by the administrative law judge with respect to those charges is the civil penalty.

Claimant also asked whether I intended to permit a respondent to avoid default by requesting an option not sanctioned by 49 CFR 386.14(b). In other words, if binding arbitration is not available to respondents for maximum civil penalty violations under section 222 of the Motor Carrier Safety Improvement Act of 1999 (MCSIA) because it is not sanctioned by the Rules of Practice, then Claimant is asking how I could allow a respondent to choose that option.

Respondent should have been aware of the Guidance, not only because it was published in the Federal Register, but also because the Notice of Claim stated that a copy was available from the service center. Nevertheless, Claimant is mistaken in his assumption that requesting binding arbitration, even on a section 222 violation, is an option not sanctioned by 49 CFR 386.14(b). In replying to a notice of claim, 49 CFR 386.14(b)(3) allows a respondent the option of “seeking binding arbitration in accordance with the Agency’s program.” There is no statement in the Rules of Practice that FMCSA will not arbitrate section 222 cases or that the “Agency’s program” is set forth in its

³ Order Appointing Administrative Law Judge, April 8, 2010, at 4.

March 4, 2004 Guidance,⁴ which is the sole source for the statement that “FMCSA will not agree to arbitrate maximum civil penalty cases issued pursuant to section 222 of [MCSIA].”⁵ Given the lack of clear direction in the Rules of Practice, I am not willing to declare this Respondent in default.⁶ I am putting motor carriers on notice, however, that, from this date forward, the selection of binding arbitration as a reply to a Notice of Claim seeking the maximum civil penalty under section 222 of MCSIA will not be sufficient to avoid the declaration of a default.

Furthermore, Claimant did not refer to the Guidance in his November 2, 2007 “Motion for Entry of Partial Default Judgment and Memorandum in Support.” Instead, Claimant cited the Final Order in *In the Matter of Sea & Air Express Corp.*,⁷ which is not a section 222 case; it involved a statutory minimum \$25,000 civil penalty for unauthorized transportation of household goods under 49 U.S.C. § 14901(d)(3), and it may not be lowered by FMCSA. Section 222 of MCSIA, on the other hand, does contain a provision permitting a lower than maximum civil penalty under certain circumstances, to wit:

Extraordinary Circumstances. – If the Secretary determines and documents that extraordinary circumstances exist which merit the assessment of any civil penalty lower

⁴ See *Guidance for the Use of Binding Arbitration under the Administrative Dispute Resolution Act of 1996*, Docket No. FMCSA-2003-14794, 69 Fed. Reg. 10288, March 4, 2004.

⁵ Order Appointing Administrative Law Judge, April 8, 2010, at 5, citing 69 Fed. Reg. 10288, 10292 (March 4, 2004).

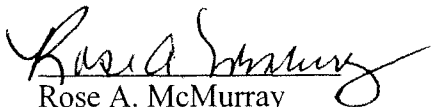
⁶ Moreover, if I were to declare a default, it would be a reconsideration of the Order Appointing Administrative Law Judge, in which I found that Respondent had avoided a default. Reconsideration is not permitted at this stage of the proceedings. See *In the Matter of Murray & Sons Transportation, Inc.*, Docket No. FMCSA-2004-18514, Order, November 15, 2004 (“This matter is not before the Assistant Administrator, and the Petition is denied.”).

⁷ Docket No. FMCSA-2007-27384, May 11, 2007, at 3.

than any level established under subsection (b), the Secretary may assess such lower penalty. In cases where a person has been found to have previously committed the same or a related violation of critical or acute regulations issued to carry out a law in subsection (a), extraordinary circumstances may be found to exist when the Secretary determines that repetition of such violation does not demonstrate a failure to take appropriate remedial action.⁸

Whether or not it can do so successfully, I agree with Respondent that it should be permitted to argue that circumstances warrant a lower than maximum penalty amount. This argument, however, will take place before Judge Isaac D. Benkin, and not before an arbitrator, as Respondent had requested.

It Is So Ordered.



Rose A. McMurray
Assistant Administrator
Federal Motor Carrier Safety Administration

5.7.10
Date

⁸ Pub. L. 106-159, Title II, § 222, Dec. 9, 1999, 113 Stat. 1769, 49 U.S.C. § 521 Note.

CERTIFICATE OF SERVICE

This is to certify that on this 10 day of May 2010, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

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The Honorable Ronnie A. Yoder
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A handwritten signature in cursive script, reading "Jennie Miller", is written over a horizontal line.